stitution, as well as the Commerce Clause and Article I, Section 8 (presumably Clause 17), of the Constitution. It seems to be well settled that the Fourteenth Amendment is not applicable in the District of Columbia, *Wight* v. *Davidson*, 181 U. S. 371, and that the Commerce Clause operates as a limitation solely upon the States and constitutes no bar to action of the Congress of the United States, *Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 1, 209, 6 L. Ed. 23, 73. These principles were recently restated in *Neild, et al.* v. *District of Columbia*, 71 App. D. C. 306, 110 F. 2d 246 (1940). Insofar as Article I, Section 8, Clause 17, of the Constitution is concerned, which authorizes Congress to exercise exclusive legislation over the District of Columbia, the Congress has clearly imposed a tax on "all tangible personal property" not exempted (Sec. 47-1207, D. C. Code 1940; Appendix A to Petition) which, as the Court of Appeals pointed out (R. 47), expressly includes "vessels, ships and boats". Finally, although the Fifth Amendment does apply to the District of Columbia, *Neild, et al.* v. *District of Columbia, supra*, it is clear that there has not been a denial of due process within the meaning of that Amendment. In *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24, it was stated:

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause."

And in the recent case of *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, rehearing denied 336 U. S. 928, which involved State taxation of vessels and the due pro-

cess clause of the Fourteenth Amendment, this Court said (p. 174):

> "* * * So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State."

As pointed out by the Court of Appeals (R 46), the vessels here involved have a taxable situs in the District, such vessels come into the District on an average of once a day, and the petitioner's commercial transactions center in the District. The contention in the Petition (pp. 7, 13) that the District sought to increase the tax assessments from 100% of exaggerated full value to 173% of such value has no basis in the Record. The District's proposed basis of apportionment was 75% of the value of the Company's floating equipment (R. 3, 24). The further assertion in the Petition (p. 7) that District officials do not know how to impose an apportioned tax is obviously erroneous as evidenced by the fact that the District did propose a formula (R. 1, 3, 24), even though it did not contend that its proposed formula was the one and only solution to the problem (R. 25, 26). The District suggested that if there was a different and more equitable basis for apportioning the tax, the petitioner should submit it to the Board (R. 3, 25).

The *sixth* "question presented" as to whether the District statutes involved were intended to tax only tangible personal property which is in the District with such a degree of permanence "that it is wholly beyond the taxing jurisdiction of any state or states" seems to be adequately answered by the authorities cited and discussed by the

Court of Appeals in its two decisions in this case, particularly the latest (R. 45-53).

The *seventh* "question presented" is clearly answered by the statute involved, enacted by the Congress, as set forth in the decision of the Court of Appeals (R. 47).

The *eighth* "question presented" as to whether the statute of limitations provided by Sec. 47-1408, D. C. Code 1940, applies with respect to the tax years involved has been fully answered by the Court of Appeals (R. 53). The finding of the Board of Tax Appeals that petitioner's returns for the years involved were "false and incorrect", as set forth in answer to the first question presented, *supra*, could have been set aside by the Court of Appeals if such finding was clearly wrong. *District of Columbia* v. *Pace*, 320 U. S. 698, 702. Instead the Court said (R. 53): "The evidence adequately supports the findings. This being so the assessments in question were not barred by the statute of limitations." This Court said in the *Pace* case (320 U. S. 703): "We are not called upon to separate factual from legal grounds of decision and to determine if reversal of the Board of Tax Appeals by the Court of Appeals could stand on questions of law alone."

The *ninth* "question presented" is whether the Court of Appeals could properly pass upon what petitioner describes as a "newly raised issue". The Petition states (p. 19) that the "apportionment issue" was not before the Court of Appeals at all in No. 9827 and was not properly before the Court of Appeals in the instant case, No. 10,519. This contention is without basis in view of the Court's decision in No. 9827 (84 U. S. App. D. C. 367, 174 F. 2d 505) and the District's "Statement of Points" on appeal (Tr. 101) as set forth in the counter statement of the case, *supra*, p. 6. In any event, although an appellate court ordinarily does not give consideration to issues not properly raised below, particularly where litigants have had no opportunity to introduce evidence on such issues, this is not an inflexible

rule. This applies with respect to statutes which give to Circuit Courts of appeals the power to modify, reverse or remand decisions of the Federal Board of Tax Appeals (now the Tax Court) "as justice may require". *Hormel* v. *Helvering*, 312 U. S. 552, 556. The provisions of the statute which gives to the United States Court of Appeals for the District of Columbia Circuit the power to modify or reverse decisions of the Board of Tax Appeals for the District of Columbia (Sec. 47-2404, D. C. Code 1940) authorize the Court to modify or reverse such decisions, with or without remanding the case for hearing, "as justice may require".

CONCLUSION

It is submitted that the petition for writ of certiorari should be denied.

Respectfully,

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
Attorneys for Respondent,
District Building,
Washington 4, D. C.